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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5881

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, AND THE SCHOOL CITY OF BEECH GROVE, INDIANA,
Petitioners,

vs.

UNITED STATES OF AMERICA, DONNY BRURELL BUCKLEY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE SCHOOL TOWN OF SPEEDWAY, INDIANA, AND THE SCHOOL CITY OF BEECH GROVE, INDIANA,

Petitioners,

vs.

UNITED STATES OF AMERICA, DONNY BRURELL BUCKLEY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners The School Town of Speedway and The School City of Beech Grove, Indiana, pray that a Writ of Certiorari issue to review the decision rendered in this cause on August 21, 1974, by the United States Court of Appeals for the Seventh Circuit.[1]

---

1. A complete list of respondents is as follows: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Erle A. Kightlinger, as President of The Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, Members of the Board of School Commissioners of the City of

OPINIONS AND ORDERS BELOW

1. The decision of the United States District Court for the Southern District of Indiana, finding that the Board of School Commissioners of the City of Indianapolis, Indiana, had engaged in segregatory practices, is reported at 332 F. Supp. 655 (S.D. Ind. 1971), and appears in the Joint Appendix[2] at p. A-157. This decision was affirmed, 474 F.2d 81 (7th Cir. 1973), *cert. denied,* 413 U.S. 920 (1973), Joint Appendix at p. A-119.

Indianapolis; Otis R. Bowen, as Governor of the State of Indiana; Theodore Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Greenwood Community School Corporation, Johnson County, Indiana; Carmel-Clay Schools, Hamilton County, Indiana; Mt. Vernon Community School Corporation, Hancock County, Indiana; Greenfield Community School Corporation, Hancock County, Indiana; Mooresville Consolidated School Corporation, Morgan County, Indiana; Plainfield Community School Corporation, Hendricks County, Indiana; Avon Community School Corporation, Hendricks County, Indiana; Brownsburg Community School Corporation, Hendricks County, Indiana; Eagle-Union Community School Corporation, Boone County, Indiana; The Indiana State Board of Education, a public corporate body; Citizens for Quality Schools, Inc.,; Coalition for Integrated Education; Hamilton Southeastern Schools, Hamilton County, Indiana; Center Grove Community School Corporation, Johnson County, Indiana; Clark-Pleasant Community School Corporation, Johnson County, Indiana; Southern Hancock County Community School Corporation, Hancock County, Indiana; Northwestern Consolidated School District, Shelby County, Indiana.

2. The term "Joint Appendix", sometimes abbreviated "Jt. App.", refers to the "Joint Appendix of Petitioners For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit", filed herein by petitioners and others.

2. The Order on Petition to Intervene entered by the United States District Court for the Southern District of Indiana on September 14, 1971, is unreported and appears at Joint Appendix at p. A-138.

3. The Entry of such District Court made December 30, 1971, ruling on certain motions, is unreported and appears at Joint Appendix p. A-135.

4. The Trial Notice Entry of such District Court dated February 2, 1973 is unreported and appears at Joint Appendix p. A-118.

5. The Entry for June 11, 1973, of such District Court is unreported and appears at Joint Appendix p. A-116.

6. The Memorandum of Decision of such District Court handed down on July 20, 1973, is reported at 368 F. Supp. 1191 (S.D.Ind. 1973), and appears at Joint Appendix p. A-35.

7. The Supplemental Memorandum of Decision of such District Court, dated December 6, 1973, is reported at 338 F. Supp. 1223 (S.D. Ind. 1973) and appears at Joint Appendix p. A-83.

8. The Opinion of the United States Court of Appeals for the Seventh Circuit decided August 21, 1974 is unreported and appears at Joint Appendix p. A-2.

9. The Order of the United States Court of Appeals for the Seventh Circuit, dated October 3, 1974, denying petitions for rehearing, is unreported and appears at Joint Appendix p. A-34.

JURISDICTION

The judgment and decree of the United States Court of Appeals for the Seventh Circuit was entered August 21, 1974. Petitioners filed their Petition for Rehearing on September 3, 1974. Such Petition was denied by the Court of Appeals on October 3, 1974.

This petition for certiorari is filed within ninety days of October 3, 1974. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether any legal basis exists for imposition of an inter-district remedy in a multi-district school desegregation case where one district, the Indianapolis Public School System (IPS), was adjudged to have effected a dual school system, but petitioners were found not to have committed any acts of segregation or discrimination, and at all times operated separate, independent unitary school systems for and within the separate municipalities of the Town of Speedway and City of Beech Grove, Indiana.

II.

Whether legislation which consolidated city and county forms of government, but did not change the jurisdictions, boundaries or operations of eleven separate, independent school corporations, can be held to be violative of the Constitution, where one of such school corporations operated segregated schools but the other ten such corporations were affirmatively found not to have committed any acts of discrimination or segregation and operated unitary school systems.

III.

Whether petitioners were denied due process of law by the Courts below which held that petitioners were bound by a judgment of segregation made against IPS, although that judgment was made in a trial and action in which petitioners were never parties and petitioners were precluded from litigating such issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions and statutes relevant to the issues in this case are: U. S. Constitution Amendments V, X and XIV; Indiana Acts 1969, Ch. 173, p. 357, I.C. 1971 18-4-1-1 to 18-4-5-4; Burns Ind. Stats. §§ 28-1701 through 28-1712, Ind. Acts 1965, ch. 307. All of such provisions are set forth in pertinent part in the Joint Appendix, p. A-120 *et seq.*

STATEMENT OF THE CASE

Petitioners The School Town of Speedway, Indiana, and The School City of Beech Grove, Indiana, are school corporations created and existing under Indiana law. They own and operate school systems which serve respectively, the civil Town of Speedway and the civil City of Beech Grove, Indiana, two communities located adjacent to the City of Indianapolis, Indiana. Speedway, Beech Grove and Indianapolis are all located in Marion County, Indiana.

All public schools within Marion County are owned and operated by a total of eleven independent school corporations, including petitioners. Of these, eight are township school systems which had a 1972-73 combined student population of 72,083.[3] The Indianapolis Public School System (IPS) is located entirely within the former boundaries of the City of Indianapolis. In 1972-73 IPS enrolled 97,833 students, with a racial composition of approximately 60 percent white and 40 percent black.

3. The eight township school systems in Marion County are: The Metropolitan School District of Decatur Township, Marion County; The Franklin Township Community School Corporation, Marion County, Indiana, The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; and The Metropolitan School District of Wayne Township, Marion County, Indiana.

During 1972-73, petitioner The School Town of Speedway enrolled 2,417 students and petitioner The School City of Beech Grove had a student population of 2,747. The boundaries of such School Town and School City are coterminous respectively with the civil Town of Speedway and the civil City of Beech Grove.

The City of Beech Grove is governed by an elected Mayor and seven-man council form of government. The Mayor appoints various members of his administration, including the City Attorney, Chief of Police, the Chief of the Fire Department and various other city employees. The City has its own separate police, fire, park and sanitation districts, street maintenance and other similar services.

The Town of Speedway is governed by an elected town board of trustees. The town board is empowered to control all other municipal departments and to appoint their administrators. These additional departments administer fire and police protection, sanitary services, street construction and maintenance, park facilities and water works for the citizens of the Town of Speedway.

The School City of Beech Grove is governed by a five-man board of school trustees, appointed by the common council of the City of Beech Grove. Likewise, the administration of the School Town of Speedway is vested in a three-man board of school trustees who are appointed by the Town board. The school trustees are statutorily vested with power to govern the school corporation, including the power to hold and own real estate in the name of the School City or Town. Both of these boards of school trustees in turn appoint a school superintendent with general day-to-day administrative duties and responsibilities.

Neither petitioners nor the communities they serve have ever been a part of IPS or the City of Indianapolis. Petitioners are, under Indiana law, separate corporations with the power

to sue and be sued, to tax and issue bonds for school purposes, to acquire and hold title to real and personal property, and to generally administer their educational facilities and programs. *Burns Ind. Stats.* §§ 28-1701 through 28-1712, *Ind. Acts* 1965, ch. 307. (Jt. App. p. A-214)

Indianapolis I

What has come to be known as *Indianapolis I* began on May 31, 1968, when the United States of America filed suit under 42 U.S.C. § 2000c-6 against the Board of School Commissioners of the City of Indianapolis (I.P.S.) and its Superintendent. On August 18, 1971, the district court found that IPS had operated a segregated school system. *U.S.* v. *Board of School Commissioners,* 332 F. Supp. 655 (S.D. Ind. 1971). (Jt. App. p. A-157)

In its opinion the district court speculated that any plan of desegregation limited to IPS might not "work" because of a possible "exodus" of white families from the area served by IPS. The decision also focused in part on the "Consolidated First Class Cities and Counties Act", commonly known as "Uni-Gov". *Indiana Acts* 1969, Ch. 173, p. 357, I.C. 1971 18-4-1-1 to 18-4-5-4. (Jt. App. p. A-221) This legislation was passed in order to consolidate the governmental functions theretofore performed by the City of Indianapolis and Marion County. The boundaries of the new City of Indianapolis were generally extended by Uni-Gov to the boundaries of Marion County, with certain exceptions. The City of Beech Grove and the Town of Speedway were, however, unaffected by Uni-Gov in their status as separate municipal corporations. 332 F. Supp. at p. 676, f.n. 93. (Jt. App. p. A-198)

The Uni-Gov legislation made no change in the jurisdiction, boundaries, territories served or operations of petitioners or any other school corporation in Marion County. As stated by the District Court:

> "The Uni-Gov Act provides expressly that 'any school corporation, all or a part of the territory of which is in

> the consolidated city or county' shall not be affected by the Act. Thus Uni-Gov leaves the defendant School City [IPS] exactly where it found it: confined to an area in the central part of the consolidated City of Indianapolis, where it is surrounded by eight township school systems operating independently within the purportedly unified City, and by two additional independent school corporations operated by Beech Grove and Speedway City. . . ." 332 F. Supp. at 676. (Jt. App. p. A-198)

Despite the fact that Uni-Gov made no alteration in the Marion County schools, the trial court was critical of its effect. The court felt that it was required to fashion a decree which would provide a "stable" racial balance or mix within IPS. This end, the Court reasoned, could not be accomplished unless the Court could require not only all Marion County schools but also schools outside of the county to participate in a multi-district remedy.

> "Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's [IPS] jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County." *Id.* at 679. (Jt. App. p. A-204)

Plaintiff United States was ordered to file appropriate pleadings to secure the joinder of additional school corporations. Although the United States took steps to serve the additional defendants with summons', it failed to file any claims or complaints against them.

Indianapolis II

Because of the refusal of the United States to follow the Court's instruction, the plaintiffs Buckley were allowed to intervene. (Jt. App. p. A-138) Eventually, petitioners and eighteen other school corporations within and without Marion County,

and certain state officials, were made defendants to answer to the allegations of intervenors' complaint. That complaint alleged that petitioners and the other defendants had committed discriminatory and segregatory acts and that the Uni-Gov legislation was unconstitutional. (Jt. App. pp. A-143-148) *Indianapolis II*, as the courts below styled it, had begun.

Petitioners were concerned from the outset with the prospect of being bound in any way by the evidence, findings or judgment entered in *Indianapolis I*, and a number of motions were filed raising this issue. In its entry dated December 30, 1971, the trial court ruled upon such motions and stated:

> "The court recognizes that the main thrust of the added defendants' various motions to dismiss the intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. This position is valid. Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the court entered before joinder of the added defendants." (Jt. App. p. A-136)

On January 28, 1972, petitioners and a number of the added defendants filed their "Joint Motion of Certain Defendants to Clarify or Modify Court Entry of December 30, 1971." That Motion alleged an ambiguity in the Court's Entry of December 30, 1971 in that such Entry did not specifically state that previous testimony, as well as previous findings, would not be binding upon the added defendants. The motion thus sought an order from the Court that evidence taken previously in the original cause brought by the United States would not be admissible in the trial of the issues raised by the amended complaint of the plaintiff-intervenors. On January 3, 1973, the trial court entered a "Memorandum of Decision" in which

it held in response to this Motion that "the Court's Entry of December 30, 1971 speaks for itself, and no clarification is deemed necessary."

In an Entry of February 2, 1973, the district court set the instant action for trial and stated that:

> "The trial will be limited to the issues formed on the Amended Complaint of the intervening plaintiffs, Donny Brurell Buckley and Alycia Marquese Buckley and the answers thereof." (Jt. App. p. A-118)

On June 11, 1973, one day before the trial of the instant action commenced, the district court *sua sponte* ruled for the first time at a "pre-trial conference" that the judgment of August 18, 1971 holding that IPS operated a segregated school system would be *res judicata* in the trial of the action brought by the intervening plaintiffs Buckley. (Jt. App. p. A-117) On the first day of trial, June 12, 1973, certain of the added defendants, including petitioners, filed their written objections to that ruling.

Following a lengthy trial, the District Court held on July 20, 1973 that: (1) desegregation of IPS on a 60% white—40% black ratio could be achieved; (2) but that ratio would not be "stable" and IPS would have a black majority within two or three years; (3) the State officials-defendants were responsible for the segregatory acts of IPS and those acts were "imputed" to the State; and (4) petitioners and the other added defendants school corporations had not committed any acts of discrimination or segregation. (Jt. App. p. A-35)

To "cure" the State's Constitutional violations the trial court, with certain exceptions, ordered IPS to transfer a designated percentage of black students to the added defendants' schools. (Jt. App. pp. A-67-68) On December 6, 1973, the District Court issued its Supplemental Memorandum of Decision, primarily directed to the Indiana State Legislature and containing "guidelines" as to legislation which the court requested the Indiana State Legislature to enact in order to form a metropolitan

school system for students in Marion County and the adjoining counties. (Jt. App. p. A-83)

At the conclusion of such Memorandum, the Court vacated its pupil transfer orders but continued in effect other orders requiring "in service training courses" for faculties and staff. (Jt. App. pp. A-101-102) The Court, however, certified its pupil transfer orders and conclusions of law, contained in *Indianapolis II*, for appeal as provided in 28 U.S.C. § 1292(b). (Jt. App. p. A-102)

The trial court's decision in *Indianapolis II* was appealed to the Seventh Circuit Court of Appeals. In an opinion dated August 21, 1974, that Court:

> (1) affirmed the trial court's findings against the "State" and the State officials-defendants;
>
> (2) reversed the trial court's findings and orders "insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries";
>
> (3) vacated the trial court's rulings and orders "insofar as they pertain to a remedy within the boundaries of Uni-Gov", and remanded the case to the district court "for further proceedings consistent with" this Court's decision in *Milliken* v. *Bradley*, ... U.S. ....., 41 L.Ed. 2d 1069 (1974). The trial court was directed to "determine whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken;" and
>
> (4) affirmed the trial court's decision holding that petitioners and the other added defendants were bound by the judgment of segregation made against IPS in *Indianapolis I*. (Jt. App. p. A-32)

Petitioners filed their Petition for Rehearing on September 3, 1974. That Petition was denied on October 3, 1974.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Decision Below Is in Conflict With This Court's Decision in Milliken v. Bradley

In *Milliken* v. *Bradley*, upon facts similar in many respects to the instant action, this Court held:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district sgeregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy." 41 L.Ed. 2d 1091.

Here the Court of Appeals has remanded this action to the district court in order to "determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." This part of the Seventh Circuit's opinion contemplates further action against petitioners to effect a multidistrict remedy, and under the facts of this case and the teaching of *Milliken*, is in error.

Before an inter-district remedy may be imposed, *Milliken* requires: (1) "a constitutional violation in one district that produces a significant segregative effect in another district";

or (2) that "racially discriminatory acts of the state or local school districts or of a single school district have been a substantial cause of inter-district segregation." In the instant case segregation has been found in only one district and all other districts were affirmatively adjudged to have operated unitary, nondiscriminatory systems.

The enactment of Uni-Gov, therefore, cannot possibly "warrant an inter-district remedy." As pointed out above, that legislation did nothing to alter or change the school jurisdictions, boundaries and operations which have existed in Marion County for more than half a century. The boundaries and jurisdictions of petitioners and the municipalities which they serve, and the boundaries and jurisdictions of IPS and all other school corporations in Marion County were totally unaffected by Uni-Gov. But no matter what the effect of Uni-Gov has been, there is no basis for further proceedings on remand because, on this record, there is a total absence of inter-district segregation.

In *Milliken* this Court considered the effect of legislation which rescinded Detroit's voluntary desegregation plan. In rejecting a contention that such legislation constituted an act of segregation this Court stated:

> "That plan . . . had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tri-county area." 41 L. Ed. 2d 1094.

So, too, in the case at bar, there can be no factual, logical or legal causal connection between the distribution of pupils by race in Marion County and the Uni-Gov legislation. To paraphrase *Milliken:* "Disparate treatment of White and Negro students occurred within [IPS] and not elsewhere, and on this record the remedy must be limited to that system." 41 L.Ed.2d 1092.

2. The Decision Below Is in Conflict with Spencer v. Kugler and Other Parallel Decisions

Petitioners are independent school corporations serving a Town and City separate from the municipality of Indianapolis. Their position in this litigation is therefore squarely governed by *Spencer* v. *Kugler*, 326 F.Supp. 1235 (D.N.J. 1971) aff'd. 454 F.2d 829 (3rd Cir. 1972) aff'd. *per curiam*, 404 U.S. 1027 (1972). In that case the plaintiffs attacked New Jersey statutes which provided that:

> "Each municipality shall be a separate local school district except as otherwise provided in this chapter and except that each incorporated village shall remain a part of the district in which it is situated at the time of its incorporation." 326 F.Supp. 1240.

These provisions were attacked by the plaintiffs on the ground that they reinforced and solidified racially imbalanced municipalities and their school systems. In dismissing the plaintiffs' Complaint, the three-judge district court stated:

> "It is clear that these Legislative enactments prescribe school district boundaries in conformity with municipal boundaries. This designation of school district zones is therefore based on the geographic limitations of the various municipalities throughout the State. Nowhere in the drawing of school district lines are considerations of race, creed, color or national origin made.
>
> *The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority.* The system as provided by the various Legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality—school district. *Racially balanced municipalities are beyond the pale of either judicial or Legislative intervention.*" 326 F.Supp. 1240. (Emphasis supplied.)

The decision of the Third Circuit Court of Appeals and the United States Supreme Court in affirming this decision is dis-

positive of the issues raised by plaintiffs in this case against petitioners.

The opinion of the Seventh Circuit Court of Appeals in this case is also in conflict with *Bradley* v. *School Bd. of City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), aff'd. by an equally divided court, 412 U.S. 92 (1973), *Keyes* v. *School District No. 1, Denver Col.*, 413 U.S. 189 (1973), and *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *Richmond* proscribed an inter-district remedy involving school districts which were coterminous with city and county boundaries absent an affirmative showing that such boundaries were established and maintained in violation of a federally protected right. *Swann* and *Keyes* held that the nature of the violation must determine the scope of the remedy and that separate, identifiable and unrelated schools cannot be involved in inter-district remedies.

3. Petitioners Have Been and Will Continue to Be Deprived of Due Process of Law

The Courts below held petitioners bound under the doctrine of res judicata by the judgment entered in *Indianapolis I* that IPS operated a dual school system. That judgment underpinned the entire trial and decision from which this appeal is taken. Petitioners were not parties to the action in which such judgment was entered and were affirmatively foreclosed by the trial and appellate courts from litigating this fundamental issue. Now the Court of Appeals has held that petitioners will still be bound by such adjudication while the trial court decides whether Uni-Gov "warrants an inter-district remedy."

This Court in a number of decisions has proscribed on Constitutional principles action similar to that taken by the courts in the instant case. As stated in *Hansberry* v. *Lee*, 311 U.S. 32 (1940):

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in

> personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require . . ." 311 U.S. 40-41. [citations omitted.] See also, *Mullane* v. *Central Hanover Bank & Tr. Co.*, 332 U.S. 306 (1950).

This elementary aspect of due process was recently reiterated in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) where this Court stated:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." 402 U.S. 329.

Other Supreme Court authorities which support petitioners' position are: *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), (parent corporation not lible for the acts of its subsidiary under the doctrine of *res judicata*); *In Re Howard*, 76 U.S. 175 (1870), (claimants to a fund not concluded by prior adjudication to which they were not parties even though the prior actions involved similar parties with similar claims and had been affirmed by the United States Supreme Court); and *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955). See also the remarkably similar case of *Northern Bank of Kentucky* v. *Stone*, 88 Fed. 413 (C.C.D. Ky. 1898), opin. by Taft, J.

Undoubtedly, the zeal of the courts below in attempting to expeditiously effect a remedy led to the determination that the earlier judgment would be *res judicata*. However, as stated in a recent landmark case:

"But none of these considerations justify disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by Congressional mandate, or by the Federal Rules of Civil Procedure. . . . It is an historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protection against oppressions, including oppressions by those whose intentions may be above reproach." *Eisen* v. *Carlisle & Jaquelin*, 479 F.2d 1005 (2nd Cir. 1973).

4. Court of Appeals Has Decided Important Issues of Law Fundamental to the Further Conduct of This Case

The Seventh Circuit's order of remand does not detract from the merits of this Petition. A writ of certiorari was granted in *Milliken* notwithstanding the remand orders contained in the opinion of the Sixth Circuit. This Court has also repeatedly held in other cases that a writ of certiorari may issue notwithstanding a remand of the case by the Court of Appeals if there is present an important and clear cut issue of law fundamental to the further conduct of the case. *U.S.* v. *G.M.C.*, 323 U.S. 373 (1944); *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964); *Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The issues discussed in this Petition meet these criteria.

CONCLUSION

This school litigation has been before the lower courts for almost seven years and now affects over 170,000 pupils. The foregoing shows that the Seventh Circuit Court of Appeals has decided important questions of federal law which will govern the further conduct of this case and which are in conflict with applicable decisions of this Court. A writ of certiorari should issue to review that decision.

Respectfully submitted,

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